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S&C memo

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SEC Adopts Rules Regulating SPAC Formation and De-SPAC Transactions

Rules Mandate Specific Disclosures, Eliminate the PSLRA Safe Harbor for De-SPAC Projections, and Provide Guidance on Underwriter and Investment Company Status

SUMMARY

On January 24, 2024, by a 3-2 vote, the U.S. Securities and Exchange Commission adopted final rules[1] imposing a wide range of new requirements on IPOs of special purpose acquisition companies (SPACs)[2] and subsequent mergers/acquisitions involving SPACs and private operating companies (de-SPAC transactions). According to the SEC, the rules are "intended to enhance investor protection in SPAC IPOs and de-SPAC transactions with respect to the adequacy of disclosure and the responsible use of projections."[3] More broadly, the SEC also adopted new rules and amendments with respect to shell companies and blank check companies, including SPACs.

In summary, the SEC adopted the following new rules and amendments:

- Amendments to eliminate the Private Securities Litigation Reform Act of 1995 ("PSLRA") safe harbor for forward-looking statements, such as projections, for filings by SPACs;
- A rule providing that a target in a registered de-SPAC transaction is a "co-registrant" and an "issuer" such that the target will be subject to strict liability under U.S. securities laws, and will be required to begin filing reports with the SEC after effectiveness of the de-SPAC registration statement;
- A rule providing that any business combination transaction involving a reporting shell company, including a SPAC, is deemed to involve a "sale" of securities to the shareholders of the shell company, thus subjecting the transaction to registration with the SEC, regardless of whether securities are changing hands in the transaction;

- Increased disclosure requirements regarding SPAC sponsors, their compensation, conflicts of interest and dilution;
- A rule requiring disclosure of the determination by the SPAC board of directors on whether a de-SPAC transaction is advisable and in the best interests of the SPAC and its shareholders (including disclosure of the material underlying factors), if such determination is required by the law of the SPAC's jurisdiction;
- Enhanced disclosure requirements for the presentation of projections, including disclosures of the purpose of projections, any material assumptions, and whether or not projections still reflect the view of the board or management of either the SPAC or the target company;
- A rule requiring a post-de-SPAC company to re-determine its "smaller reporting company" ("SRC") status and reflect this re-determination in its filings beginning 45 days after closing of the de-SPAC transaction, which will cause most post-de-SPAC issuers to lose the ability to use SRC scaled disclosures sooner than under the existing rules; and
- A rule aligning the financial statement requirements of private targets in transactions involving shell companies with those required in registration statements for IPOs, including three years of audited statements of comprehensive income, changes in stockholders' equity and cash flows (subject to EGC disclosure accommodations).

In addition to the final rules and amendments, there are certain key topics on which the SEC chose to issue guidance, rather than adopting the rules proposed in March 2022.[4] Specifically, the SEC did not adopt, but instead provided guidance with respect to:

- Proposed Rule 140a under the Securities Act of 1933 (the "Securities Act"), which would have deemed an underwriter in a SPAC's IPO to be an "underwriter" in the de-SPAC transaction if it took "steps to facilitate the de-SPAC transaction, or any related financing transaction, or otherwise participates (directly or indirectly) in the de-SPAC transaction"; and
- Proposed Rule 3a-10 under the Investment Company Act of 1940 (the "1940 Act"), which would have provided a non-exclusive safe harbor from the 1940 Act definition of "investment company" for SPACs that meet certain conditions.

The final rules will become effective 125 days after the publication of the adopting release in the Federal Register and will have a compliance date on the effective date, other than for the new Inline XBRL tagging requirements, the compliance date for which is 490 days after the date of publication of the adopting release in the Federal Register. It remains to be seen whether the new rules and amendments will become subject to procedural or other challenges.

Appendix A to this memorandum provides a tabular overview of the new rules and amendments.

BACKGROUND

Following exceptionally high levels of SPAC activity in late 2020 and early 2021, the SEC made SPACs an area of significant regulatory focus.[5] The proposed rules regulating SPACs, which the SEC Staff proposed for public comment in March 2022, marked the most comprehensive step in that regulatory review. In light of the proposed rules, SPACs and other market participants have in many respects already structured transactions as if the proposed rules had been in effect, which resulted in significant changes to market practice, including SPACs providing less comprehensive or no projections, and changes in processes and procedures for de-SPAC transactions generally. In addition, the market has witnessed a notable increase in SEC enforcement activity, as well as private litigation, focused on alleged misleading disclosures, including projections, in de-SPAC transactions and, to a lesser extent, SPAC IPOs.

SPAC IPO and de-SPAC market activity has slowed considerably in tandem with these developments, together with a meaningful increase in costs and complexity of de-SPAC transactions and generally for SPACs and their targets. In 2023, 31 SPAC IPOs raised gross proceeds of approximately $3.8 billion, compared to 613 IPOs raising gross proceeds of approximately $162.5 billion in 2021.[6] In 2023, 89 de-SPAC transactions were completed, compared to 199 de-SPAC transactions in 2021.[7] The new rules and amendments are likely to reinforce these trends.

SUMMARY OF THE FINAL RULES

The final rules include new items and amendments to Regulation S-K and new rules and amendments to existing rules under the Securities Act, the Securities Exchange Act of 1934 (the "Exchange Act") and Regulation S-X. As noted above, the adopting release also provided guidance on determining the statutory underwriter status of de-SPAC participants and the status of SPACs under the 1940 Act. The adopting release categorizes the final rules into five main areas of focus:

1. Enhanced disclosure requirements regarding the SPAC's sponsor and de-SPAC transactions

The SEC adopted new Subpart 1600 to Regulation S-K substantially as proposed, with certain modifications in response to commenters. Subpart 1600 prescribes disclosure requirements regarding the SPAC's sponsor, potential conflicts of interest, and dilution for SPAC IPOs as well as de-SPAC transactions. The proposed fairness determination requirement for de-SPAC

transactions was revised to focus on situations in which a determination as to the advisability of the proposed de-SPAC transaction is required by the law of the jurisdiction in which the SPAC is organized.

- ***SPAC Sponsor and Conflicts of Interest.*** The SEC adopted Item 1603(a) of Regulation S-K substantially as proposed, with certain modifications. The new item will specify and expand disclosure requirements to provide information about the SPAC sponsor and its affiliates, as well as any promoters of the SPAC, including, among other things:
  - their experience in organizing SPACs and the extent to which they are involved in other SPACs;
  - their material roles and responsibilities in directing and managing the SPAC's activities;
  - any agreement, arrangement, or understanding between the SPAC sponsor and the SPAC, its executive officers, directors, or affiliates in determining whether to proceed with a de-SPAC transaction;
  - the nature and amount of compensation that has been or will be awarded, earned by, or paid to the SPAC sponsor, its affiliates, and any promoters;
  - any circumstances or arrangements under which the SPAC sponsor, its affiliates, and its promoters, directly or indirectly, have transferred or could transfer ownership of securities of the SPAC, or that have resulted or could result in the surrender or cancellation of such securities;
  - any controlling persons and persons who have direct and indirect material interests in the SPAC sponsor, as well as the nature and amount of their interests (the SEC, however, did not adopt the proposed requirement to include an organizational chart);
  - any agreement, arrangement, or understanding, including any payments, between the SPAC sponsor and unaffiliated security holders of the SPAC regarding the redemption of outstanding securities; and
  - tabular disclosure of any material lock-up agreements.

  Additionally, Item 1603(b) of Regulation S-K will require disclosure of actual or potential material conflicts of interest, such as conflicts in determining whether to proceed with a de-SPAC transaction, or conflicts arising from the manner in which the SPAC compensates the SPAC sponsor, officers, and directors, between (i) the sponsor or its affiliates, the SPAC's officers, directors, or promoters or the target company's officers or directors and (ii) unaffiliated security holders.

- ***Dilution.*** Items 1602 and 1604 of Regulation S-K will require tabular dilution disclosure on the prospectus cover page of SPAC IPO registration statements and within the prospectus summary of de-SPAC registration statements. Additional information will also be required on the prospectus cover page and within the prospectus summary regarding, among other things, sponsor compensation, dilution and conflicts of interest. Notably, in

response to comments received, the SEC did not add a "net cash per share" disclosure requirement as it had considered in a request for comment, because, among other things, substantially all the information that would be conveyed to an investor by a net cash per share measure would be conveyed by the required "net tangible book value per share, as adjusted" disclosure.[8]

- ***Fairness of De-SPAC Transaction.*** The SEC adopted Item 1606(a) of Regulation S-K with modifications relative to the proposed rules to address concerns raised by commenters. The required disclosure about the board's determination is limited to situations in which a determination as to the advisability of the de-SPAC transaction is required by the law of the jurisdiction in which the SPAC is organized (*e.g.*, Section 251(b) of the Delaware General Corporation Law). In contrast to the proposed rule, Item 1606(a) will not require a determination that the de-SPAC transaction is substantively fair or the SPAC to make a fairness or other determination when it is not otherwise required to do so under applicable State or foreign corporate law.

  Item 1606(b) of Regulation S-K, which requires disclosure of the factors considered by a SPAC's board of directors (or similar governing body) in deciding to proceed with a de-SPAC transaction, was adopted substantially as proposed. These factors must include, but not be limited to: the valuation of the target company; the consideration of any financial projections; the terms of financing materially related to the de-SPAC transaction, any report, opinion, or appraisal obtained from a third party; and the dilutive effects to shareholders of the de-SPAC transaction.[9]

- ***XBRL Tagging.*** Item 1610, which was adopted as proposed, will require SPACs to tag the information disclosed pursuant to Subpart 1600 of Regulation S-K in Inline XBRL, a structured, machine-readable data language. However, the rule is subject to a phased-in compliance date that is 490 days after the publication of the adopting release in the Federal Register.

2. Rules Designed to Align De-SPAC Disclosures More Closely with Those for IPOs

The final rules set forth new rules and amendments designed to align the treatment of private operating companies entering the public markets through de-SPAC transactions more closely with those conducting IPOs.

- ***Target as Co-Registrant to Form S-4 and Form F-4.*** The final rules, adopted substantially as proposed, will treat a private operating target as a "co-registrant" when a SPAC files a registration statement on Form S-4 or F-4 (or Form S-1 or F-1, if the securities to be issued in the de-SPAC transaction are registered on such forms) and as an "issuer" under Section 6(a) of the Securities Act. Accordingly, the final rules will require that the target and its related Section 6(a) signatories sign a registration statement for a de-SPAC transaction. This requirement will make the target, its principal executive officer, principal financial officer, principal accounting officer, and board of directors or similar governing body (subject to a due diligence defense for all parties other than the SPAC and the target)[10] liable for any material misstatements or omissions in the registration statement under Section 11 of the Securities Act. This expansion of liability for defects in the registration statement, which principally contains business and financial information about the target, will be relevant for liability of individuals (*i.e.*, principal executive officer, principal financial officer, principal accounting officer and the board of directors of the

target). In addition, the final rules require that the names of all co-registrants appear on the cover page.

- With respect to holding company de-SPAC transactions, the final rules require that the target and its Section 6(a) signatories sign the registration statement filed by a holding company. In addition, where the target is not an entity but consists of a business or assets, the seller of the business or assets is deemed to be a registrant and must be so designated on the cover page of the registration statement.[11]

  As "registrant" and "issuer," a target company (including multiple target companies) will be required to file Exchange Act reports with the SEC after the effectiveness of the de-SPAC registration statement and until the target terminates and/or suspends its Exchange Act reporting obligations.[12]

- ***Underwriter Liability in De-SPAC Transactions.*** The SEC did not adopt proposed Rule 140a under the Securities Act, which would have provided that "[a] person who has acted as an underwriter of the securities of a [SPAC] and takes steps to facilitate the de-SPAC transaction, or any related financing transaction, or otherwise participates (directly or indirectly) in the de-SPAC transaction" would be deemed to be an underwriter within the meaning of Section 2(a)(11) of the Securities Act. Instead, the SEC provided guidance that it intends to follow its "longstanding practice of applying the statutory terms 'distribution' and 'underwriter' broadly and flexibly, as the facts and circumstances of any transaction may warrant." In the adopting release, the SEC acknowledged that in a de-SPAC transaction, there is generally no single party accepting securities from the issuer with a view to resell such securities to the public in a distribution in the same manner as a traditional underwriter in traditional capital raising. Nevertheless, in a de-SPAC distribution, the SEC believes that there would be an underwriter present where someone is selling for the issuer or participating in the distribution of securities in the combined company to the SPAC's investors and the broader public. Depending on the facts and circumstances, the SEC believes that such an entity could be deemed a "statutory underwriter" even though it may not be named as an underwriter in any given offering or may not be engaged in activities typical of a named underwriter in traditional capital raising. The SEC stated that Section 11 of the Securities Act would apply as it would to anyone acting as underwriter with respect to a registered de-SPAC transaction, and such person will have liability for any material misstatement or omission in the registration statement.

  Notably, the SEC clarified that the guidance in the adopting release is not intended to influence traditional practice in M&A transactions, which "have a different purpose."[13] While they take the form of a business combination, the SEC noted that de-SPAC transactions serve as the means by which a private company may enter the public market for the first time through the merger with a public shell and thus are the equivalent of an IPO by the target.

- ***Elimination of PSLRA Safe Harbor.*** The final rules, adopted substantially as proposed, amended the definition of "blank check company" solely for purposes of the PSLRA by removing the "penny stock" condition from the definition. This will eliminate the PSLRA safe harbor for forward-looking statements, such as projections, for filings by SPACs and certain other blank check companies. Under existing Rule 419, SPACs are generally not "blank check companies" because they are not selling "penny stock," as defined in Rule 3a51-1 under the Exchange Act. In contrast to the proposed rule, the SEC did not amend Rule 419. Instead, the SEC adopted a definition of "blank check company" under the PSLRA in Rule 405 under the Securities Act and Rule 12b-2 under the Exchange Act

to clarify that such definitions are solely for purposes of the PSLRA and not for purposes of any other rules.

As a result, these changes do not call into question the applicability of the PSLRA to traditional M&A transactions.

- ***Smaller Reporting Company Re-Determination.*** The final rules, adopted substantially as proposed, will require an issuer to re-determine its SRC status following the de-SPAC transaction and reflect this re-determination in its SEC filings beginning with its first SEC filing made after the 45-day period following closing of the de-SPAC transaction (under the proposed rules, a registrant might have needed to reflect non-SRC status sooner, *i.e.* in its first filing after the filing of its "Super 8-K," which is due four business days after closing). To re-determine SRC status, the registrant's public float will be measured as of a date within four business days following the consummation of a de-SPAC transaction and annual revenues measured using the annual revenues of the target company as of the most recently completed fiscal year reported in that Form 8-K. This will generally require SPACs that initially qualified as SRCs to provide more comprehensive disclosures (such as three years of financial statements and quantitative and qualitative information about market risk) earlier following a de-SPAC transaction than under existing rules (subject to potential EGC disclosure accommodations). Currently, SRC status is determined at the time of filing of the SPAC's initial registration statement on Form S-1 or F-1, it is re-determined on an annual basis and the post-de-SPAC company is permitted to retain this status until the next annual determination date in de-SPAC transactions in which the SPAC is the legal acquirer.[14] In response to comments, the final rules exclude, in post-de-SPAC transaction filings, any financial statements that predate the financial statements presented in the Form S-4 or Form F-4.

  The SEC did not adopt, as suggested by commenters, any amendments with respect to filer status, EGC status or foreign private issuer ("FPI") status determinations upon completion of a de-SPAC transaction. However, the SEC recognized that, "depending on the structure of a specific de-SPAC transaction, there may be some fact-specific circumstances in which an FPI registration statement may be used. For example, a SPAC's use of an FPI registration statement (*e.g.*, Form F-4) and compliance with FPI rules in connection with the de-SPAC transaction may be appropriate when, as of a date within 30 days prior to the filing of the de-SPAC transaction registration statement, the SPAC is a foreign issuer [but not an FPI] that is entering a de-SPAC transaction with a target company that is an FPI but is not a shell company, the legal entity that is the SPAC will be the legal entity that is the combined company registrant following the de-SPAC transaction, and . . . is expected to be an FPI at the time of consummation of the de-SPAC transaction."[15]

- ***Minimum Dissemination Period.*** Rules 14a-6 and 14c-2 under the Exchange Act were amended, and instructions to Forms S-4 and F-4 were added, to require that disclosure documents in de-SPAC transactions be disseminated to investors at least 20 calendar days in advance of a shareholder meeting or the earliest date of action by consent, or the maximum period for disseminating such disclosure documents permitted under the laws of the jurisdiction of incorporation or organization if such period is less than 20 calendar days.[16]

3. Enhanced Projections Disclosure

The SEC adopted the amendment of Item 10(b) of Regulation S-K as proposed, and the new Item 1609 of Regulation S-K substantially as proposed, except for certain clarifying revisions.

The amendment to Item 10(b), which will apply generally to all issuers, will require, among other things, that any projected measures not based on either financial results or operational history must be clearly distinguished from those that are based on financial results and operational history. Additionally, projections based on historical measures and operating history will need to be presented with equal or greater prominence than their counterparts not based on financial results or operating history. For projections based on a non-GAAP measure, the amendment to Item 10(b) will state that the presentation should include a clear definition or explanation of the non-GAAP measure, a description of the most closely related GAAP measure and an explanation of why the non-GAAP measure was selected instead of a GAAP measure. However, consistent with existing guidance, the reference to the nearest GAAP measure called for by amended Item 10(b) will not require a reconciliation to that GAAP measure. The need to provide a GAAP reconciliation will continue to be governed by Regulation G and Item 10(e) of Regulation S-K.[17]

New Item 1609 of Regulation S-K, which only applies to de-SPAC transactions, will require SPACs to disclose, among other items, the purpose for which financial projections were prepared, any material factors that may impact the material assumptions underlying the projections and whether or not the projections still reflect the view of the board of directors (or similar governing body) or management of either the SPAC or the target company in respect to the financial outlook on the filing date.

4. Status of SPACs Under the Investment Company Act of 1940

The SEC did not adopt proposed Rule 3a-10 to the 1940 Act, which would have provided a non-exclusive safe harbor from the definition of "investment company" under Section 3(a)(1)(A) of the 1940 Act for a SPAC that satisfies certain conditions, including conditions as to the SPAC's asset holdings, primary business of the combined company, distribution of assets not used in connection with the de-SPAC transaction, and completion of de-SPAC transaction within a certain time period. In declining to adopt the proposed rule, the SEC stated that "given the fact-based, individualized nature of this determination and because, depending on the facts and circumstances, a SPAC could be an investment company at any stage of its operation such that a specific duration limitation may not be appropriate."[18] It further stated that whether a SPAC could

be an investment company under Section 3(a)(1) of the 1940 Act is a facts and circumstances analysis and provided the following list of factors (largely aligned with the *Tonopah* factors)[19] which a SPAC should evaluate both at its inception and throughout its existence.[20]

- ***The Nature of SPAC Assets and Income.*** If the SPAC is a passive investor or one whose assets consist of 40% or more of investment securities as defined in the 1940 Act. A SPAC that holds only the sort of securities typically held by SPACs today, such as U.S. Government securities, money market funds and cash items prior to the completion of the de-SPAC transaction, and that does not propose to acquire investment securities, would be more likely not to be considered an investment company under Section 3(a)(1)(C).[21] While U.S. Government securities and money market funds are securities for purposes of Section 3(a)(1)(A), asset composition is only one of the factors that should be considered in analyzing a SPAC's status under the 1940 Act. For example, an issuer that holds these assets, but whose primary business is to achieve investment returns on such assets would still be an investment company under Section 3(a)(1)(A).
- ***Management Activities.*** If the officers, directors and employees did not actively seek a de-SPAC transaction or spent a considerable amount of their time actively managing the SPAC's portfolio for the primary purpose of achieving investment returns. In addition, the SEC stated that these activities could cause SPAC sponsors to trigger the definition of investment adviser under the Investment Advisers Act of 1940.
- ***Duration.*** If there is an extensive time period before a de-SPAC transaction, it may make it harder to distinguish the SPAC's activities from those of an investment company. In evaluating this factor, the SPAC should consider Rule 3a-2 of the 1940 Act (which provides a one-year safe harbor to so-called "transient investment companies") and Rule 419 of the Securities Act (18 months). The SEC noted that a SPAC that operates beyond the timelines in these rules raises concerns that it may be an investment company and these concerns increase as the departure from these timelines lengthens.
- ***Holding Out.*** If a SPAC markets itself in a manner that suggests an investor should invest in its securities primarily to gain exposure to its portfolio of securities prior to a de-SPAC transaction, it would likely be an investment company.
- ***Merger with an Investment Company.*** If the SPAC engages or proposes to engage in a de-SPAC transaction with an investment company, such as a closed-end fund or business development company.

5. Rules Relating to Business Combinations Involving Shell Companies Generally

The SEC adopted new Rule 145a under the Securities Act as proposed. Rule 145a deems a business combination of a reporting shell company (including, but not limited to, a SPAC) with a non-reporting entity that is not a shell company to involve the "sale" of securities to the shareholders of the reporting shell company. Therefore, the disclosure requirements and liability provisions of the Securities Act will apply to the transaction and subject the transaction to registration with the SEC, regardless of whether securities are changing hands in the transaction. The SEC noted that the final rule will not have any impact on traditional M&A transactions between

operating businesses, including transactions structured as traditional reverse mergers and other traditional business combination transactions that make use of only business combination-related shells.[22]

The SEC adopted the new proposed Article 15 to Regulation S-X mostly as proposed. Article 15 will more closely align financial statement reporting requirements in M&A transactions between a shell company and a private operating company with financial statement reporting requirements in connection with an IPO. These requirements include, among other items, the disclosure of three years of statements of comprehensive income, and changes in stockholders' equity and cash flows. However, under Rule 15-01(b) of Regulation S-X, a shell company registrant will be permitted to include two years of statements of comprehensive income, changes in stockholders' equity and cash flows for the target company where both the shell company and a target company would qualify as an EGC. In contrast to existing guidance under the SEC Staff Financial Reporting Manual,[23] this will not depend on whether the shell company has filed or was already required to file its annual report.

IMPLICATIONS

Although SPACs and other market participants have in many respects already structured transactions as if the proposed rules had been in effect, the implementation of the final rules can be expected to support ongoing SEC focus on de-SPAC transactions, SPAC IPOs, and post-de-SPAC companies, including through the SEC's review of the de-SPAC transaction, as well as enforcement activity. Key implications of the final rules include:

1. Enhanced Disclosure Requirements

SPACs currently undergoing de-SPAC transactions should take active steps to evaluate their disclosures and, as necessary, prepare required disclosures to comply with the final rules. Although the SEC noted that until the compliance date, which is 125 days after the publication of the adopting release in the Federal Register, de-SPAC transactions may be completed under the existing rules, we expect that the SEC Staff will look to the adopting release in its review of de-SPAC transactions even before the compliance date.

2. Underwriter Liability in De-SPAC Transactions

The SEC's proposal to adopt Rule 140a under the Securities Act, together with statements in the 2022 proposing release regarding the interpretation of the terms "distribution" and "underwriter,"

led to significant changes in how SPACs and other market participants structure de-SPAC transactions. While the SEC did not adopt proposed Rule 140a, the adopting release provided guidance that the SEC believes de-SPAC transactions generally involve "distributions" of securities because the private operating company is being introduced to the public markets, which is effectively how its securities "come to rest"—in other words, are distributed—to public investors as shareholders of the combined company.[24] The SEC codified this position in new Rule 145a. The discussion in the adopting release refers to, and in many ways reaffirms, the Staff's assessment of "statutory underwriter" status in de-SPAC transactions detailed in the proposing release. The proposing release noted that, by way of example, "financial advisors, PIPE investors, or other advisors, depending on the circumstances, may be deemed statutory underwriters in connection with a de-SPAC transaction if they are purchasing from an issuer 'with a view to' distribution, are selling 'for an issuer,' and/or are 'participating' in a distribution."[25] The adopting release does not repeat this example or otherwise provide additional clarity as to when and in what circumstances a participant in a de-SPAC transaction might be subject to statutory underwriter liability, and we see no reason why practices and procedures adopted by market participants following the proposing release in March 2022 would change in light of the final rules. As a result, it remains unclear whether market practices in de-SPAC transactions will go back to pre-adopting release practices. However, and importantly, the SEC does clarify, in response to extensive comment, that its underwriter interpretation does not extend to a business combination not involving a de-SPAC transaction or "traditional M&A transactions."[26] This clarification provides much-needed guidance for business combination transactions but still leaves open the application of the SEC's interpretation to other situations involving registered offerings and concurrent private placements or offshore offerings.

Read together with new Rule 145a, the SEC reiterated that a de-SPAC transaction could involve liability under Section 11(a)(4) of the Securities Act for experts.[27] According to the Staff's view expressed in the proposing release, experts could "[d]epending on the transaction and whether services are provided by other parties . . . include, for example, valuation consultants, outside reviewers of management projections, or anyone who provides a fairness opinion about the transaction."[28]

3. Elimination of PSLRA Safe Harbor, Projections and Fairness of De-SPAC Transaction

Projections have long been used in connection with de-SPAC transactions, and market participants have generally taken the view that the PSLRA safe harbor is available. Following the

proposed rules, SPACs have generally provided less comprehensive or no projections. As was the case after the proposing release, SPAC sponsors will need to continue to consider the potential liability exposure associated with the unavailability of the PSLRA safe harbor when deciding whether and to what extent to use projections in connection with de-SPAC and PIPE transactions. Additionally, similar considerations would be relevant for de-SPAC participants that may be deemed statutory "underwriters" by the SEC. Excluding SPACs from the safe harbor liability protections of the PSLRA may reduce investor information and lead to increased litigation with respect to the information that is provided, which, together with the considerations above, is expected to continue to drive SPACs to use less comprehensive projections or consider discontinuing their use.

It remains to be seen to what extent SPACs will include projections in light of the elimination of the PSLRA safe harbor together with the requirement to disclose the board's determination, if required by the law of the SPAC's jurisdiction, as to the advisability of the transaction (and material underlying factors). In the SEC's view, at least the disclosure requirement in Item 1606(a) should not be interpreted as creating "a requirement, implicit or explicit, or expectation that a fairness opinion must be obtained to comply with its requirements."[29] Even though the final rules do not require SPACs to obtain a fairness opinion from a financial advisor, SPACs may still seek fairness opinions to substantiate their determination as to the advisability of the transaction. Although fairness opinion providers are generally not considered "statutory underwriters," under the guidance in the adopting release, a fairness opinion provider who "participates" in the distribution of the securities in the de-SPAC transaction could be viewed by the SEC as a "statutory underwriter" under the guidance in the adopting release.

4. Investment Company Status

While the SEC declined to adopt Proposed Rule 3a-10 under the 1940 Act, it provided guidance on the application of determining the status of SPACs under Section 3(a)(1)(A) of the 1940 Act. In its guidance, the SEC generally followed the traditional *Toponah* factors, although it seemed to impose new timelines that could be considered as a factor in the SEC's determination. These timelines are based on Rule 3a-2 of the 1940 Act (which provides a one-year safe harbor to so-called "transient investment companies") and Rule 419 of the Securities Act (18 months). The SEC declined to adopt commenters' suggestion to follow the listing standard requirement for SPACs to complete a de-SPAC transaction within three years.

Notably, the SEC clarified in the adopting release that the allocation of a SPAC's assets to U.S. Government securities and/or money market funds would not in and of itself make the SPAC an "investment company." Rather, "[a] SPAC that holds only the sort of securities typically held by SPACs today, such as U.S. Government securities, money market funds and cash items prior to the completion of the de-SPAC transactions, and that does not propose to acquire investment securities, would be more likely not to be considered an investment company under 3(a)(1)(C). While U.S. Government securities and money market funds are securities for purposes of Section 3(a)(1)(A), asset composition is only one of the factors that should be considered in analyzing a SPAC's status under the Investment Company Act."[30] SPAC sponsors should carefully consider this guidance.

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ENDNOTES

1 SEC Release Nos. 33-11265; 34-99418; IC-35096; File No. S7-13-22 (Special Purpose Acquisition Companies, Shell Companies, and Projections) ("adopting release"), *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

2 A SPAC is a shell company formed for the purpose of acquiring or merging with a private company within a defined time frame. A SPAC completes an initial public offering of shares or units consisting of redeemable shares and warrants. The sponsors of a SPAC typically receive attractively priced warrants and "founder" shares. If the SPAC identifies a target company for a de-SPAC transaction, the SPAC's public shareholders have the option to redeem their shares prior to the de-SPAC transaction to receive a pro rata amount of the remaining proceeds from the SPAC's initial public offering.

3 SEC Adopts Rules to Enhance Investor Protections Relating to SPACs, Shell Companies, and Projections, available at https://www.sec.gov/news/press-release/2024-8.

4 SEC Release Nos. 33-11048; 34-94546; IC-34549; File No. S7-13-22 (Special Purpose Acquisition Companies, Shell Companies, and Projections) ("proposing release"), *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

5 For more details, *see* our memorandum to clients, SEC Proposes Sweeping Changes Regulating SPAC Formation and De-SPAC Transactions, available at https://www.sullcrom.com/insights/memo/2022/March/SEC-Proposes-Sweeping-Changes-Regulating-SPAC-Formation-and-De-SPAC-Transactions.

6 SPAC and US IPO Activity, *available at* https://www.spacanalytics.com. *See also* Adopting release at p. 14, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

7 *Id.*

8 Adopting release at p. 113, p. 144, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

9 Adopting release at p. 545, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

10 Adopting release at p. 192, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

11 Adopting release at p. 200, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

12 The SEC clarified that targets may look to Rule 12h-3 under the Exchange Act and Staff Legal Bulletin 18 for guidance to immediately suspend their reporting obligations under Section 15(d) of the Exchange Act (1) in situations in which the de-SPAC transaction does not close, or (2) at the closing of the de-SPAC transaction. Pursuant to new Rule 15-01(a), only target companies that would constitute the "predecessor" for financial reporting purposes (which is the case for most de-SPAC transactions with a single target) would be required to comply with Rule 15-01 of Regulation S-X and provide financial statements audited in accordance with PCAOB standards in connection with a de-SPAC transaction. Adopting release at p. 206, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

13 Adopting release at p. 289, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

14 *See* Item 10(f)(2) of Regulation S-K; Rule 405 under the Securities Act; Rule 12b-2 under the Exchange Act.

15 Adopting release at pp. 231-32, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

16 Item 1608 of Regulation S-K clarifies that SPACs that file a Schedule TO for a redemption must keep the redemption period open for at least 20 business days to comply with Rule 13e-4 and Regulation 14E. Similarly, prospectuses included in Forms S-4 or F-4 must be disseminated at

least 20 business days before the shareholders meeting if the registration incorporates any information about the registrant or its target by reference.

17 Adopting release at p. 345, footnote 1084, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

18 Adopting release at p. 364, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

19 Adopting release at pp. 365-70, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf. To assess an issuer's primary engagement under Section 3(a)(1)(A), and in other contexts under the 1940 Act, the SEC historically have looked at (1) the company's historical development; (2) its public representations of policy; (3) the activities of its officers and directors; (4) the nature of its present assets; and (5) the sources of its present income (known as the "*Tonopah* factors"). *See In the Matter of Tonopah Mining Co.*, 26 S.E.C. 426 (July 21, 1947). The SEC has also considered the activities of the company's employees, in addition to the company's officers and directors, in determining a company's primary business. *See*, *e.g.*, 17 CFR 270.3a-8 (Rule 3a-8 under the 1940 Act); Snowflake Inc., Release No. IC-34049 (Oct. 9, 2020) [85 FR 65449 (Oct. 15, 2020)] (notice), Release No. IC-34085 (Nov. 4, 2020) (order); Lyft Inc., Release No. IC-33399 (Mar. 14, 2019) [84 FR 10156 (Mar. 19, 2019)] (notice), Release No. IC-33442 (Apr. 8, 2019) (order).

20 *Id.*

21 Adopting release at p. 366, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

22 Adopting release at p. 295, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

23 Paragraph 10220.7 of the SEC's Financial Reporting Manual states that the SEC Staff will not object if two years of the target's annual financial statements and interim financial statements are presented in a proxy statement filed after the legal acquirer's initial public offering of common equity securities but prior to the filing or the filing deadline of the legal acquirer's first Form 10-K, only if (i) the legal acquirer is an EGC that is not a shell company, or (ii) the legal acquirer is a shell company EGC (such as a SPAC EGC) and the target would be an EGC if it were conducting an initial public offering of common equity securities.

24 Adopting release at p. 284, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

25 Proposing release at p. 98, *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

26 Adopting release at p. 289, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

27 Adopting release at p. 302, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf; proposing release at p. 107, *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

28 Proposing release at p. 108, footnote 235, *available at* https://www.sec.gov/rules/proposed/2022/33-11048.pdf.

29 Adopting release at p. 139, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

30 Adopting release at p. 366, *available at* https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

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APPENDIX A

NEW RULE REQUIREMENTS

1. New Rules and Amendments

Amendment	Affected Forms and Schedules
Rule 145a Under the Securities Act Deems a business combination of a reporting shell company (including, but not limited to, a SPAC) with an entity that is not a shell company to involve the "sale" of securities to the shareholders of the reporting shell company.	• Forms S-4 and F-4 • Forms S-1 and F-1 • Schedules 14A and 14C • Schedule TO
Amendments to Regulation S-X Amend financial statement requirements and the forms and schedules filed in connection with business combination transactions involving shell companies (other than business combination-related shell companies), including de-SPAC transactions, to align more closely required disclosures about the target company with those required in a Form S-1 or F-1 for an IPO, including: • Expanding the circumstances in which target companies may report two years, instead of three years, of audited financial statements (resulting in a decrease in burden) (Rule 15-01(b)); and • Further aligning the requirements for audited financial statements in these transactions with those required in a registered IPO (resulting in an increase in burden) (Rule 15-01(c), (d) and (e)).	• Forms S-4 and F-4 • Schedules 14A and 14C • Schedule TO
Amendments to Forms S-4 and F-4, and S-1 and F-1 as applicable • Amend Form S-4 and Form F-4 (or Form S-1 or F-1, if the securities to be issued in the de-SPAC transaction are registered on a Form S-1 or F-1) to require that if the securities to be registered on the form will be issued by a SPAC or another shell company in connection with a de-SPAC transaction, the registrants also include the target company. • As a registrant under Rule 405 and an issuer under Section 6(a) of the Securities Act, the target company, along with its principal executive officer(s), its principal financial officer, its comptroller or principal accounting officer, and a majority of its board of directors or persons performing similar functions, must sign a registration statement filed for a de-SPAC transaction.	• Forms S-4 and F-4 • Forms S-1 and F-1

Amendment	Affected Forms and Schedules
Amendments to Rules 14a-6 and 14c-2 Under the Exchange Act and New Instructions to Forms S-4 and F-4 Require disclosure of de-SPAC transactions to be disseminated to investors at least 20 calendar days in advance of a shareholder meeting or the earliest date of action by consent, or the maximum period for disseminating such disclosure documents permitted under the laws of the jurisdiction of incorporation or organization if such period is less than 20 calendar days.	• Schedules 14A and 14C • Forms S-4 and F-4
Amendment to Rule 405 Under the Securities Act and 12b-2 Under the Exchange Act Removes the "penny stock" condition from the definition of "blank check company" in Rules 405 and 12b-2, eliminating the PSLRA safe harbor for forward-looking statements for SPACs.	N/A

2. New Regulation S-K Disclosure Requirements

Amendment	Affected Forms and Schedules
Item 1602: Registered Offerings by SPACs • Require tabular dilution disclosure on the prospectus cover page of SPAC IPO registration statements. • Require summary disclosure of other information on the prospectus cover page and in the prospectus summary regarding, among other things, sponsor compensation, dilution and conflicts of interest.	• Forms S-1 and F-1
Item 1603: SPAC Sponsor; Conflicts of Interest • Require certain disclosures regarding the SPAC sponsor, its affiliates, and any promoters of the SPAC. • Require disclosure regarding conflicts of interest between: (1) a SPAC sponsor, its affiliates, officers, directors, or promoters of a SPAC, or target company officers or directors; and (2) unaffiliated security holders of the SPAC.	• Forms S-1, F-1, S-4, and F-4 • Schedules 14A and 14C • Schedule TO
Item 1604: De-SPAC Transactions • Require tabular dilution disclosure on the prospectus summary of de-SPAC registration statements. • Require disclosure of other information on the prospectus cover page and in the prospectus summary regarding, among other things, sponsor compensation, dilution and conflicts of interest.	• Forms S-4 and F-4 • Schedules 14A and 14C • Schedule TO

Amendment	Affected Forms and Schedules
Item 1605: Background of and Reasons for the De-SPAC Transaction; Terms of the De-SPAC Transaction; Effects Require disclosure on the background, material terms, and effects of the de-SPAC transaction.	• Forms S-4 and F-4 • Schedules 14A and 14C • Schedule TO
Item 1606: Board Determination About the De-SPAC Transaction • Require disclosure, if the law of the jurisdiction in which the SPAC is organized requires its board of directors to determine whether the de-SPAC transaction is advisable and in the best interests of the SPAC and its security holders or otherwise make any comparable determination, of such determination. (Rule 1606(a)) • Require a discussion of the material factors the board of directors (or similar governing body) considered in making the determination. (Rule 1606(b)) • Require certain disclosures as to the approval of security holders, the approval of directors, and the retention of unaffiliated representatives. (Rule 1606(c)-(e))	• Forms S-4 and F-4 • Schedules 14A and 14C • Schedule TO
Item 1607: Reports, Opinions, Appraisals, and Negotiations • Require disclosure regarding any report, opinion (other than an opinion of counsel), or appraisal received by a SPAC or a SPAC sponsor from an outside party or an unaffiliated representative acting on behalf of unaffiliated security holders relating to any determination described in response to Item 1606(a), approval of the de-SPAC transaction, consideration to be offered in the de-SPAC transaction, or fairness of the de-SPAC transaction to the SPAC, its security holders, or SPAC sponsor. (1607(a)) • Require disclosure of the qualifications of the outside party or unaffiliated representative, method of selection, and certain material relationships that existed during the past two years. (1607(b))	• Forms S-4 and F-4 • Schedules 14A and 14C • Schedule TO
Item 1608: Tender Offer Filing Obligations Require additional disclosures in a Schedule TO filed in connection with a de-SPAC transaction so that the Schedule TO contains substantially the same information about a target company that is required under the proxy rules.	• Schedule TO

Amendment	Affected Forms and Schedules
Item 1609: Projections in De-SPAC Transactions Require, regarding projections disclosed in connection with a de-SPAC transaction, disclosure of: • purpose for which the projections were prepared and the party that prepared the projections; (1609(a)) • all material bases of the disclosed projections and all material assumptions underlying the projections, and any material factors that may affect such assumptions; and (1609(b)) • whether or not the projections reflect the view of SPAC's (or target company's) management or board about its future performance. (1609(c))	• Forms S-4 and F-4 • Schedules 14A and 14C • Schedule TO • Form 8-K
Item 1610: Structured Data Requirement Require information disclosed pursuant to Subpart 1600 to be tagged in Inline XBRL, a structured, machine-readable data language.	• Forms S-1, F-1, S-4, and F-4 • Schedules 14A and 14C • Schedule TO
Item 10(f)(2)(iv): SRC Status Redetermination Requirements • Require the post-business combination company to reflect SRC re-determination in filings beginning 45 days after consummation of the de-SPAC transaction. • The registrant's public float must be measured as of a date within four business days following the consummation of a de-SPAC transaction and annual revenues measured using the annual revenues of the target company as of the most recently completed fiscal year reported in that Form 8-K.	• Forms 10-K and 10-Q, • Schedules 14A and 14C • Forms S-1
Amendment of Item 10(b) of Regulation S-K • Requires, among other things, that any projected measures not based on either financial results or operational history must be clearly distinguished from those that are based on financial results and operational history. • Projections based on historical measures and operating history need to be presented with equal or greater prominence than their counterparts not based on financial results or operating history.	All filings